[71] F.M.S. REPORTS

NAWI BIN BUYONG v. PUBLIC PROSECUTOR

[C.A. (Thomas C.J., Burton Ag. C.J. (S.S.) and Cussen J.) December 7, 1935]
[Perak Criminal Appeal No. 10 of 1935]

Courts Enactment, 1915, s.42(i)(b) — Power of Court of Appeal in disposing of a criminal appeal — Retrial.

Where an accused person has been tried on a charge of murder and acquitted on that charge but convicted on a lesser charge and he appeals against that conviction, then the Court of Appeal has jurisdiction, even though the Public Prosecutor has not appealed against the acquittal, to order a retrial. Such order, unless so expressly limited, is an order to retry on the original charge.

Appellant in person.

H. C. Willan (Deputy Legal Adviser) for the respondent: In an appeal against a conviction the Court of Appeal must deal with the case as a whole. It is not only concerned with the conviction on the lesser charge but also with the acquittal on the charge of murder, even if the Public Prosecutor has not appealed against such an acquittal: *Krishna Dhan Mandal* v. *Queen-Empress*, I.L.R. 22 Cal. 377 and *Nazimuddin* v. *King-Emperor*, I.L.R. 40 Cal. 163. An appeal is only a continuation of the trial: *Kamban Bali Reddy* v. *King-Emperor*, I.L.R. 37 Mad. 119. The case of *Kishan Singh* v. *King-Emperor*, 55 I.A. 390 is not against me because that was not an appeal but revision. Section 439(4), Indian Criminal Procedure Code prevents an acquittal from being converted into a conviction on revision.

Cur. Adv. Vult.

Thomas C.J.: Nawi bin Buyong was charged with murdering Ong Kim Swee contrary to section 302 of the Penal Code. At the close of the trial the first Assessor said —

"Not guilty of murder. I find him guilty of inflicting a blow but not necessarily the blow which killed the deceased."

The second Assessor said —

"I am of the opinion that the accused is not guilty of murder. I do not believe the confession."

The learned trial Judge said —

"I accept the opinion of the first Assessor, and under section 166 of the Criminal Procedure Code, convict the accused of attempted murder under section 307 of the Penal Code."

In addition to the summing up the learned trial Judge has provided grounds of judgment. These state that —

"From the evidence of the witnesses for the prosecution there was sufficient to show that it was the hand of the accused which inflicted the injury, or at least one of the injuries which caused the death of the deceased."

The learned trial Judge went on to say that he accepted the opinion of the first Assessor and in view of the injuries, convicted the accused of attempted murder, which in his opinion was a lenient course to adopt. A sentence of four years' rigorous imprisonment was imposed.

The facts very shortly are that the appellant together with two others, Saman and Men, went to the shop of the deceased. The appellant wished to borrow money. The Chinese insisted that he had not any. The appellant drew a parang. The Chinese was frightened and ran away. The three chased the Chinese, and the appellant said that he wished to kill the Chinese. The appellant slashed at the Chinese with his parang in the neck. The Chinese fell down. The appellant then handed the parang to Saman and directed him to strike the Chinese. Saman did not wish to do so, but all the same he took the parang and gave the Chinese one or more blows in the neck.

It was open for the learned trial Judge on these facts to have directed the Assessors as to the existence of a common design. He did not do so. His direction included the following remarks:

"If you have any doubts in your minds that the accused was guilty of the offence, namely, if you have any doubt that he killed this old Chinaman, that he was the first person who gave the first blow which caused the death of the deceased, then you are entitled to find him not guilty."

and later on —

"It is murder or nothing so far as the accused is concerned."

It is quite clear that the only issue left to the Assessors was that of murder, and from the evidence it would seem that the issue was rightly limited to murder. I hesitate to say what might have been the result if the learned trial Judge had directed the Assessors as to the question of common design. Nor was there any direction by the learned trial Judge as to the power to convict of either an attempt to commit the offence charged or of any minor offence, although such had not been separately charged (sections 166 and 167 of the Criminal Procedure Code). But the first Assessor without any such direction appears to have found the appellant guilty of some minor offence.

[72] There was, therefore, a disagreement between the Assessors. The learned trial Judge had then the power to agree with either of the Assessors or, failing this, to order a new trial (section 196(ii), Criminal Procedure Code). The learned trial Judge interpreted the finding of the first Assessor as an attempt to commit the offence of murder, and accordingly agreed with him. This was in error, since the finding of the first Assessor could not properly be so interpreted. [72]

That conviction cannot stand, and since it has been appealed against, it must be set aside. The question remains as to what order the Court should make. Can it be said that there has been a definite acquittal on the charge of murder, and that the only power of the Court is to order a re-trial as to whether some minor offence has or has not been committed.

It is true that only one definite issue was left to the Assessors. But in spite of this one of them (with whom the learned trial Judge agreed) did not entirely acquit the appellant, but found him guilty of some offence which was not separately charged and with which it was not necessary for the appellant to be separately charged.

It would have been open for the prosecution to have appealed (see section 42 of Enactment No. 14 of 1918 as amended by Enactment Nos. 26 of 1926 and 24 of 1931). The prosecution has not done so. It is the accused who has appealed under the same section. respondent.

The question of the power of the Court has been dealt in *Krishna Dhan Mandal and others* v. *Queen Empress,* I.L.R. 22 Cal. 377. Therein it was stated:

"When an act or a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, an appeal from a conviction for any one of the offences must lay the whole case open to the interference of the Appllate Court notwithstanding any order of acquittal by the first Court in regard to any of the other offences. The interference of the Appellate Court in such a case is directed primarily, not against the acquittal, but against the conviction which is called in question by the accused, though if the interference is to be rational and complete, the Appellate Court must deal with the whole case."

In the case of *Nazimuddin* v. *King-Emperor,* I.L.R. 40 Cal. 163, 167 it was said:

"When a conviction is set aside, and a retrial ordered it is settled law that the whole case is re-opened and the accused must be tried again on all the charges originally framed."

In both these cases the appellants had been charged under separate sections of the Penal Code. There had been in each case a conviction under one section only. But the position does not, in my opinion, differ whether the appellant has been convicted under a separate charge (provided the offences are not distinct — see *Krishna Dhan Mandal* v. *Queen-Empress,* at p. 392) or under an offence which need not be separately charged.

I conclude, therefore, that the acquittal by the learned trial Judge was only part of an order which was wrong and cannot be sustained when the rest of the order is set aside. I agree with Burton J., whose judgment I have had the privilege of reading, that there must be a re-trial on the charge originally framed under section 302 of the Penal Code. This trial should be held before another Judge.

In conclusion I would wish to express my thanks to Mr. Willan (the Deputy Legal Adviser) for his assistance at the request of the Court in arguing this appeal.

Burton Ag. C.J. (S.S.): In this case the appellant, Nawi bin Buyong was charged before Howes J. and assessors on a charge of murder. The prosecution case depended on a confession retracted at the trial but not on oath, but there was a large amount of corroboration which on paper at any rate appears to raise a strong *prima facie* case.

One of the assessors brought in a simple verdict of not guilty of murder; but the other qualified it, he found the accused not guilty of murder, but found him guilty of inflicting a blow, but not necessarily the blow which killed the deceased. Howes J. then stated that he concurred with this latter finding and under section 166 of the Criminal Procedure Code convicted the accused of attempted murder under section 307 of the Penal Code and sentenced him to four years' rigorous imprisonment.

The assessor who brought in a verdict of not guilty was of course perfectly entitled to do so, and we cannot in any way quarrel with that. But it is difficult to see that the other assessor returned a proper verdict at all; if it is a verdict, I do not see how it can amount to more than simple hurt. Certainly it is not attempted murder; for the offence of attempted murder necessarily involves an intention to murder, and the striker of a blow dealt with the intention of murder in the transaction that resulted in the death of the victim, is guilty himself of murder by virtue of section 34 of the Penal Code. Howes J. realised this himself, of course; because he put the case to the assessors, — quite correctly, I think, — as murder or nothing, and if he thought with one assessor that the accused struck a blow in the transaction which led to the death of Ong [73] Kim Swee, the correct verdict [73] for him was murder.

The confusion of the assessor seems to me to be due to the fact that he was not directed at all on the subject of section 34 and common intention. If he had been, it is probable that his verdict would have been murder. But Howes J.'s summing-up seems to have conveyed the idea that it was necessary for the prosecution to make out that the accused struck the fatal blow. He says:

"If you have any doubt in your minds that the accused was guilty of the offence, namely, if you have any doubt that he killed this old Chinaman, that he was the first person who gave the first blow which caused the death of the deceased, then you are entitled to find him not guilty."

It seems to me therefore that there was no proper verdict, and that the difficulty has arisen because the assessors were not properly directed as to the effect of section 34 of the Penal Code, and that there should, if possible, be a re-trial.

It was however suggested that there had been a definite verdict of acquittal on the charge of murder and that we could not order a re-trial under section 42(i)(b)(2) of the Courts Enactment without an appeal from the Public Prosecutor. The case of *Kishan Singh* v. *King-Emperor,* 55 I.A. 390 was brought to our notice, but that case was a case of revision, and section 439(4) of the Indian Criminal Procedure Code expressly forbids the conversion of a finding of acquittal into one of conviction on revision. The case therefore is no authority in the present case. Apart from this there appears ample authority for holding that a re-trial may be ordered upon the charges as originally framed (*Krishna Dhan Mandal* v. *Queen-Empress,* I.L.R. 22 Cal. 377; *Nazimuddin* v. *King-Emperor,* I.L.R. 40 Cal. 163). Otherwise the power of ordering a re-trial would be nugatory. The acquittal on the charge of murder, whether express or implied, is merely part of the erroneous order and stands or falls with it.

I think therefore that there should be a re-trial in this case on the charge originally framed under section 302 of the Penal Code.

Cussen J.: The appellant was tried before a Judge and two assessors on a charge of murder, section 302, Penal Code.

One assessor stated as his opinion that "the accused is not guilty of murder." The other assessor stated his opinion as "not guilty of murder. I find him guilty of inflicting a blow but not necessarily the blow which killed the deceased."

The Judge agreed with the opinion of the second assessor and records:—

"I accept the opinion of Mr. McEvett; and, under section 166 of the Criminal Procedure Code, convict the accused of attempted murder under section 307 of the Penal Code."

The position was that the Court and one assessor were agreed in the opinion that the accused was not guilty of murder but was guilty of inflicting a blow but not necessarily the blow which killed the deceased.

It was then the duty of the Court, under section 196(i) of the Criminal Procedure Code to give judgment in accordance with this agreed opinion.

The only offence for which judgment could be given on this agreed opinion is the offence of causing hurt (in this case under section 324 of the Penal Code).

To give judgment that the accused was guilty of attempted murder was clearly wrong.

This Court can, under section 42(i)(b) of the Courts Enactment, alter the finding to section 324, Penal Code.

But it is clear to me from the record of the trial that this is a case in which a retrial on the original charge should be ordered, if there is jurisdiction to make such an order.

Certain evidence was wrongly admitted and there was also misdirection in the summing up to the assessors. The application of section 34 of the Penal Code — "common intention" was not explained to the assessors. Instead they were told —

> "If you have any doubt in your minds that the accused was guilty of the offence, namely, if you have any doubt that he killed this old Chinaman, that he was the first person who gave the first blow which caused the death of the deceased, then you are entitled to find him not guilty."

The question arises then whether under section 42(i)(b) of the Courts Enactment the Court of Appeal has jurisdiction to order a retrial on the original charge under section 302 of the Penal Code.

Section 42(i)(b) of the Courts Enactment corresponds with section 423(i)(b) of the Indian Code of Criminal Procedure.

The relevant Indian decisions on this point are contained in *Krishna Dhan Mandal* v. *Queen-Empress*, I.L.R. 22 Cal. 377, *Nazimuddin* v. *King-Emperor*, I.L.R. 40 Cal. 163 and *Kamban Bali Reddy* v. *King-Emperor*, I.L.R. 37 Mad. 119 and are that in a case such as the present where an accused person has been tried on a charge of murder and acquitted on that charge but convicted on a lesser charge such as culpable homicide not amounting to murder or grievous
[74] hurt and he [74] appeals against that conviction, then the Court of Appeal has jurisdiction to order a retrial and such order, unless so expressly limited, is an order to retry on the original charges. The first trial is set aside and cancelled and the proceedings commence *de novo* with the original charges, unless the prosecution decides at the retrial to proceed on a reduced charge.

I am of opinion that this Court has similar powers under section 42(i)(b) of the Courts Enactment.

I consider that in the present case the order of this Court should be that the accused be retried.

Re-trial ordered.

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[75] PRIVY COUNCIL REPORTS [75]

THE MONTREAL TRUST CO. v. THE BRITISH COLUMBIA LAND & INVESTMENT AGENCY, LTD.

[P.C. (Lords Alness, Maugham and Roche) November 15, 1935]
[Privy Council Appeal No. 30 of 1935]

Vendor and purchaser — Equity of redemption — Sale of — Indemnity — Absence of covenant of — Exclusion of implied indemnity.

The implied obligation of the purchaser of an equity of redemption to indemnify his vendor against liability under the mortgage debt may be negatived by the circumstances of any particular case. It is usual in modern conveyancing practice to insert an express covenant of indemnity, and the absence of such a covenant in a formal transfer may lead to the conclusion that the deed of transfer contains a complete record of the bargain between the parties.

Mills v. *United Counties* Bank, [1912] 1 Ch. 231, commented upon.

Walker v. *Dikson*, (1893) 20 Ont. A.R. 96; *Campbell* v. *Douglas*, 34 O.L.R. 580; 54 S.C.R. 28 followed.

PRIVY COUNCIL APPEAL from Canada.

C. R. R. Romer for the appellants.

G. P. Slade for the respondents.

Cur. Adv. Vult.

Their Lordships' judgment was delivered by —

Lord Maugham: In the months of January and February, 1926 one T. R. Nickson, who resided in the City of Vancouver, found himself in a position of considerable difficulty. He controlled and managed two companies, the Prudential Holdings, Limited, and the Nickson Construction Company, Limited, in which he was practically the sole share-holder, and he was being pressed by the Royal Bank of Canada to discharge the sum of $15,500 which was owed by the Construction Company to the bank. There had been a loan made to the Construction Company the security for which proved to be worthless, and early in February Mr. B. L. Mitchell, the manager of the Royal Bank in Vancouver, sent for Nickson and told him that the loan must be repaid immediately. Nickson applied to a friend of his, the late C. V. Cummings of Vancouver, for assistance, and Cummings thereupon called upon Mitchell at the bank, and after verifying certain statements made by Nickson, informed Mitchell that he was ready to make an advance upon having security. Nickson was not called at the trial of the action for some unexplained reason. Mitchell, however, was called and in addition to him a Mr. Coulter, a barrister and solicitor practising in Vancouver who had known Nickson for a long time and was the secretary of and held one share in Prudential Holdings, Limited; and he was a friend of Cummings. The evidence of Coulter and Mitchell shows quite clearly that the basis of the whole transaction was an advance by Cummings to Nickson to be secured in some shape or form by the latter.